Chee Boon Yeong & Anor v Minply Industries (M) Sdn Bhd and other suits

HIGH COURT (JOHOR BAHRU) — CIVIL SUITS NOS 23NCVC-49–04 OF 2012, 22NCVC-492–12 OF 2012 & 22NCVC-496–12 OF 2012
ABDUL RAHMAN SEBLI J
9 JULY 2013

Contract — Sale and purchase of land — Breach — Failure to pay balance of purchase price — Termination of agreements by vendor — Whether termination of agreements was unlawful — Whether purchaser breached agreement by failure to pay deposit and balance of purchase price within stipulated time — Whether settlement of redemption sum by vendor was term of agreements — Whether time remained essence of agreements

Land Law — Caveat — Private caveat — Removal of — Whether sale of lands could not be completed because of caveats lodged by administrators of estate of previous purchaser — Whether new purchasers were bona fide purchasers for value — Whether new purchasers were entitled to specific performance of 2012 SPAs

Civil procedure — Pleadings — Failure to plead — Whether purchaser's argument as to variation of sales and purchase agreements could be taken into consideration when same was not pleaded

Evidence — Hearsay — Oral hearsay — Oral evidence of what deceased had said — Whether admissible

On 21 July 2008, Minply Industries Sdn Bhd ('Minply') entered into two sale and purchase agreements ('the 2008 SPAs') to sell two pieces of land ('the lands') that it owned to one Chen Chui Guan ('the deceased') for a total purchase price of RM900,000. Under the terms of the SPAs, the deceased was to pay the 10% deposit for the lands on the date of execution of the SPAs and the balance of the purchase price within three months from the date of the 2008 SPAs. It was also a term of the agreement that time was of the essences of the 2008 SPAs and that if the deceased failed to pay the balance of the purchase price punctually, Minply would be entitled to terminate the two agreements and forfeit the deposits. The solicitors who prepared the 2008 SPAs were authorised to utilise part of the purchase price as redemption money to discharge the charge over the lands. However, as the redemption sum for the

lands, which was RM1.1m, exceeded the purchase price of RM900,000 the solicitors wrote to Minply to top up a sum of RM200,000. However, Minply asked for a reduction of the redemption sum but this request was declined by the bank. The deceased passed away on 9 January 2009. On 26 April 2011, by two separate letters of termination Minply terminated the 2008 SPAs on the grounds that the deceased had failed to pay the deposit and the balance of the purchase price on time. The administrators of the estate of the deceased (the administrators) filed an action against Minply seeking specific performance of the 2008 agreements, while Minply on the other hand counterclaimed for a declaration that the terminations were valid. As the administrators had lodged private caveats against the land, Minply also sought, inter alia, for removal of the caveats and damages by way of its counterclaim. It was the administrators' contention that the terminations were unlawful as Minply failed to top up the RM200,000 and that therefore there was no need for the deceased to pay the balance of the purchase price. On 14 April 2012, by two separate sale and purchase agreements ('the 2012 SPAs') Minply sold the lands to two separate purchasers, namely Eurigine Sdn Bhd ('Eurigine') and Legenia Sdn Bhd ('Legenia'). However, the sales could not be completed because of the private caveats on the lands. Eurigine and Legenia filed two separate suits against the administrators and Minply for an order that the private caveats lodged by the administrators be removed with damages to be assessed. It was Eurigine and Legenia's case that they were entitled to specific performance of the 2012 suits as they were bona fide purchasers for value. All three suits were consolidated and heard.

Held:

(1) The administrators' argument that time became at large after Minply agreed that the balance purchase price was to be paid only after Minply had topped up the RM200,000 could not be taken into consideration as it was not pleaded. It was a material and crucial assertion of fact, which ought to have been pleaded but was not. Time therefore remained of the essence of the contract and had not become at large as contended by the administrators. Consequently, Minply was entitled to terminate the 2008 SPAs for the deceased's failure to pay the deposit and the balance of the purchase price within the stipulated time. Further, the settlement of the redemption sum of RM200,000 by Minply was not a term of the 2008 SPAs. As such, the administrators' contention that the terminations were unlawful did not hold water (see para 6(b)).

(2) The evidence of the administrator on crucial issues of fact was hearsay as it was based on what the deceased had said. Further, this evidence was not reliable since this witness had lied on two material points (see para 6(c)).

(3) The allegation that the deposit sums were to be released as part of the redemption sums was also a material and crucial fact that was not

pleaded. It should therefore be excluded from consideration. On the evidence, the administrators' claim against Minply could not be sustained. On the other hand, Minply's counterclaim against the administrators had been proved on the balance of probabilities (see paras 6(d)–7).

(4) In respect of the suits filed by Eurigine and Legenia, it was clear that due to the private caveats lodged by the administrators, they could not complete the SPAs within the stipulated time to take vacant possession of the lands. In addition their bank loans to purchase the loans had been affected and they had lost business opportunities with regard to the lands. On the evidence, Eurigine and Legenia were bona fide purchasers for value without notice of the lands. In this regard and in the light of the 2008 SPAS being lawfully terminated by Minply, it followed that Eurigine and Legenia's claims against the administrators should be allowed (see paras 9–10).

[Bahasa Malaysia summary

Pada 21 Julai 2008, Minply Industries Sdn Bhd ('Minply') telah memeterai dua perjanjian jual beli ('PJB 2008') untuk menjual dua bidang tanah ('tanah-tanah') yang terhutang kepada Chen Chui Guan ('si mati') untuk jumlah harga belian RM900,000. Di bawah terma-terma PJB, si mati hendaklah membayar 10% deposit untuk tanah-tanah pada tarikh pelaksanaan SPA dan baki harga belian dalam masa tiga bulan dari tarikh PJB 2008. Adalah juga menjadi terma perjanjian bahawa masa adalah inti pati PJB 2008 dan bahawa sekiranya si mati gagal untuk membayar baki harga belian tepat pada masanya, Minply berhak untuk membatalkan kedua-dua perjanjian dan mengambil deposit-deposit. Peguam-peguam yang menyediakan PJB 2008 telah diberi kuasa untuk menggunakan sebahagian daripada harga belian sebagai wang penebusan untuk melepaskan cagaran ke atas tanah-tanah. Walau bagaimanapun, memandangkan wang penebusan bagi tanah-tanah, iaitu RM1.1juta, melebihi harga belian RM900,000, peguam-peguam telah menulis kepada Minply untuk menambah jumlah sebanyak RM200,000. Walau bagaimanapun, Minply memohon untuk pengurangan wang penebusan tetapi permintaan itu telah ditolak oleh bank. Si mati meninggal dunia pada 9 Januari 2009. Pada 26 April 2011, melalui dua surat pembatalan yang berasingan, Minply telah membatalkan PJB 2008 atas dasar bahawa si mati gagal untuk membayar deposit dan baki harga belian tepat pada masanya. Pentadbir-pentadbir estet si mati (pentadbir-pentadbir) telah memfailkan tindakan terhadap Minply memohon pelaksanaan spesifik bagi perjanjian 2008, sementara Minply sebaliknya menuntut balas untuk deklarasi bahawa pembatalan adalah sah. Memandangkan pentadbir-pentadbir telah memasukkan kaveat persendirian terhadap tanah, Minply juga memohon, antara lain, untuk penarikan kaveat dan ganti rugi melalui tuntutan balasnya. Adalah menjadi hujahan pentadbir-pentadbir bahawa pembatalan adalah tidak

sah memandangkan Minply gagal untuk menambah RM200,000 dan oleh itu adalah tidak perlu bagi si mati untuk membayar baki harga belian. Pada 14 April 2012, melalui dua perjanjian jual beli yang berasingan (PJB 2012) Minply telah menjual tanah-tanah kepada dua pembeli yang berasingan, iaitu Eurigine Sdn Bhd ('Eurigine') dan Legenia Sdn Bhd ('Legenia'). Walau bagaimanapun, jualan-jualan tidak dapat diteruskan oleh kerana kaveat persendirian ke atas tanah-tanah. Eurigine dan Legenia telah memfailkan guaman yang berasingan terhadap pentadbir-pentadbir dan Minply untuk perintah bahawa kaveat persendirian ditarikbalik bersama ganti rugi untuk ditaksirkan. Adalah menjadi kes Eurigine dan Legenia bahawa mereka berhak untuk pelaksanaan spesifik bagi guaman 2012 memandangkan mereka adalah pembeli-pembeli bona fide untuk nilai. Ketiga-tiga guaman disatukan dan didengar.

Diputuskan:

(1) Hujahan pentadbir-pentadbir bahawa 'time became at large' selepas Minply bersetuju bahawa baki harga belian hanya perlu dibayar selepas Minply telah menambah RM200,000 tidak dapat diberi pertimbangan memandangkan ianya tidak diplid. Ia merupakan penegasan fakta yang penting dan material, yang mana harus diplidkan tetapi ianya tidak. Oleh itu, masa tetap kekal menjadi inti pati kontrak dan 'had not become at large' seperti yang dihujahkan oleh pentadbir-pentadbir. Selanjutnya, Minply berhak untuk membatalkan PJB 2008 untuk kegagalan si mati untuk membayar deposit dan baki harga belian dalam masa yang ditetapkan. Tambahan, penyelesaian jumlah penebusan sebanyak RM200,000 oleh Minply bukanlah terma kepada PJB 2008. Oleh itu, hujahan pentadbir-pentadbir bahawa pembatalan adalah tidak sah tidak dapat dipertahankan (lihat perenggan 6(b)).

(2) Keterangan pentadbir mengenai isu fakta yang penting adalah kata dengar memandangkan ia berdasarkan apa yang dikatakan oleh si mati. Oleh itu, keterangan ini tidak boleh dipakai memandangkan saksi telah menipu mengenai dua poin material (lihat perenggan 6(c)).

(3) Dakwaan bahawa amaun deposit akan dikeluarkan sebagai sebahagian daripada jumlah penebusan juga adalah fakta penting dan material yang tidak diplidkan. Ia oleh itu seharusnya diketepikan daripada pertimbangan. Berdasarkan keterangan, tuntutan pentadbir-pentadbir terhadap Minply tidak dapat dipertahankan. Sebaliknya, tuntutan balas Minply terhadap pentadbir-pentadbir telah dibuktikan atas dasar imbangan kebarangkalian (lihat perenggan 6(d)–7).

(4) Berkenaan dengan guaman yang difailkan oleh Eurigine and Legenia, adalah jelas bahawa disebabkan kaveat persendirian yang dimasukkan oleh pentadbir-pentadbir, mereka tidak dapat menyempurnakan PJB dalam masa yang ditetapkan untuk milikan kosong tanah. Tambahan

pinjaman bank mereka untuk membeli tanah terjejas dan mereka kehilangan peluang perniagaan berkenaan dengan tanah tersebut. Berdasarkan keterangan, Eurigine dan Legenia adalah pembeli-pembeli bona fide untuk nilai tanpa notis tentang tanah tersebut. Berkenaan dan berdasarkan PJB 2008 yang telah dibatalkan dengan sah oleh Minply, adalah diikuti bahawa tuntutan Eurigine dan Legenia terhadap pentadbir-pentadbir harus dibenarkan (lihat perenggan 9–10).]

Notes

For cases on breach, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6067–6086.

For cases on private caveat, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2577–2578.

For cases on oral hearsay, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2016–2020.

Cases referred to

Hadmor Productions Ltd and others v Hamilton and others [1983] 1 AC 191; [1982] 1 All ER 1042; [1982] WLR 322, HL (refd)

Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428, SC (refd)

Lee Yew Hin v Kow Lup Piow [1974] 1 MLJ 114, FC (refd)

Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416, SC (refd)

S Jayakumar (Roy & Associates) in Suit Nos 492 and 496 for the plaintiff.

Goik Kenzin (Nasir, Kenzin & Tan) in Suit No 49 for the first and second defendants.

Ben Chan Chong Choon (Lewis Lim with him) (Mah Kamariah & Philip Koh) in Suit Nos 492 and 496 for the third defendant.

Abdul Rahman Sebli J:

[1] At the conclusion of the trial on 23 April 2013 I found that the plaintiffs, namely Chee Boon Yeong and Chee Lee Lian in Suit 49 failed to prove that the termination of the agreements by the defendant, namely Minply Industries (M) Sdn Bhd was unlawful. Consequently their claim against the defendant was dismissed with costs. On the other hand I found the defendant's counterclaim to have been proved on the balance of probabilities and therefore allowed the claim in terms. For Suits 492 and 496 I found that the plaintiffs, Eurigine Sdn Bhd and Legenia Sdn Bhd have proved their claim against the defendants Chee Boon Yeong and Chee Lee Lian ('the plaintiffs in Suit 49') but not against Minply. Their claims against Chee Boon Yeong and Chee Lee Lian were therefore allowed in terms and their claim against Minply Industries (M) Sdn Bhd dismissed with costs, to be paid by Chee Boon Yeong and Chee Lee Lian.

[2] The undisputed facts are as follows. Minply Industries (M) Sdn Bhd ('Minply') was the registered owner of two pieces of land, namely GM4289 Lot 15121 and GM4290 Lot 15122 ('the lands'). On 21 July 2008 Minply sold the lands to Cheng Chui Guan ('the deceased') subject to the terms and conditions stipulated in the two sale and purchase agreements ('the 2008 agreements'). The purchase price was fixed at RM450,000 each, making a total of RM900,000 for the lands. Both agreements were prepared by Napisah bt Narikkodan Mammoo of Messrs Hafez & Partners ('Hafez & Partners'). There are four important clauses to the agreements, as follows:

(a) cl 1 read with ss 7 and 8 of the Schedule required the deceased to pay 10% deposit on the date of execution of the agreements;

(b) cl 2(a) read with ss 9 and 10 of the Schedule required the deceased to pay the balance of the purchase price within three months from the date of the agreements;

(c) cl 8(a) — the solicitors Hafez & Partners were authorised to utilise such part of the purchase price paid by the deceased as redemption money to discharge the charge over the lands;

(d) cl 13 provides, inter alia, that in the event that the deceased failed to pay punctually the balance of the purchase price, Minply shall be entitled to terminate the two agreements and thereupon to forfeit the deposits; and

(e) cl 21 provides that time shall be the essence of the agreements.

[3] On 5 November 2008 United Overseas Bank (Malaysia) Bhd ('OUB') sent a letter to Hafez & Partners confirming that the redemption sum for the lands was RM1.1m, to be received by UOB by 4 February 2009. This sum exceeded the purchase price of RM900,000 for the lands. Hafez & Partners then wrote to Minply telling them to top up a sum of RM200,000 so that the sale and purchase price was equal to the redemption sum. On Minply's instruction Hafez & Partners subsequently wrote to UOB asking for a reduction of the RM1.1m redemption sum but was declined by UOB. The deceased passed away on 9 January 2009. On 26 April 2011 by two separate letters of termination, Minply terminated the two agreements on the ground that the deceased failed to pay the deposit and balance of the 90% purchase price on time. The question as between the plaintiffs and Minply in Suit 49 is whether the deceased breached the agreement by failing to pay the deposit and the balance purchase price within the stipulated time.

[4] Chee Boon Yeong and Chee Lee Lian ('the administrators') were appointed as administrators for the estate of the deceased on 4 November 2011 (the deceased passed away on 9 January 2009). Two years after terminating the 2008 agreements, ie on 14 April 2012 Minply by two separate sale and purchase agreements ('the 2012 agreements') sold the lands to Eurigine Sdn

Bhd ('Eurigine') and Legenia Sdn Bhd ('Legenia'). On 25 May 2012 the administrators lodged private caveats against the lands. Because of the private caveats, the sale of the lands to Eurigine and Legenia by Minply could not be completed. Eurigine Legenia are now seeking, inter alia, for an order that the private caveats lodged by the administrators be removed and damages to be assessed. The administrators on their part are seeking for specific performance of the 2008 agreements against Minply while Minply on the other hand counterclaims for a declaration that the terminations of the 2008 agreements were valid. They are also asking for removal of the private caveats, damages, payment for the unpaid deposit and other consequential reliefs.

[5] Minply must succeed in its counterclaim against the administrators in order to fulfil its obligation to transfer the lands free from all encumbrances to Eurigine and Legenia pursuant to the 2012 agreements. Towards that end it must establish that the 2008 agreements had been lawfully terminated. The administrators' contention is that the terminations were unlawful as the defendant failed to top up the RM200,000 and that therefore there was no need for the deceased to pay the balance of the purchase price. It was argued that by refusing to top up the RM200,000 the vendor would never be able to discharge the existing charge and this was a fundamental breach which went to the root of the contract. It was further pointed out that since Minply had agreed that time for the deceased to pay the balance 90% purchase price would only arise after Minply had topped up the RM200,000 the deceased had three months plus one month from the date of the topping up to settle the balance of the purchase price. Due to this alleged conduct by Minply it was contended that time became at large and no longer of the essence of the agreements. It was argued that Minply must therefore give the deceased or the administrators a notice fixing a reasonable time within which the deceased or the administrators must pay the 10% deposit and the balance of the purchase price and not to terminate the agreements the way it did.

[6] In my considered view and having regard to the arguments of both sides the administrators' contention does not hold water, for the following reasons:

(a) PW3 of Hafez & Partners was not the common solicitor for Minply and the deceased. PW3 was called by the administrators as their witness and she candidly admitted that she only received instructions from the deceased and not Minply in dealing with the 2008 agreements. It is therefore untenable for the administrators to argue that she was the common solicitor for both Minply and the deceased. In any event it is obvious that PW3 failed in her duty to collect the purchase price of RM900,000 from the deceased. This amount was supposed to be used by PW3 to redeem the lands from UOB.

(b) The administrators' argument that time became at large after Minply

agreed that the balance purchase price was to be paid only after Minply had topped up the RM200,000 cannot be taken into consideration as it was not pleaded. It is a material and crucial assertion of fact which ought to have been pleaded but was not. In this regard the following observations by Lord Diplock said in *Hadmor Productions Ltd and others v Hamilton and others* [1983] 1 AC 191 at p 233; [1982] 1 All ER 1042 at p 1056; [1982] WLR 322 at p 337 which the Supreme Court quoted with approval in *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 and in *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428 is relevant:

> Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is …

Time therefore remains of the essence of the contract and had not become at large as contended by the administrators. Consequently Minply was entitled to terminate the agreements for the deceased's failure to pay the deposit and the balance of the purchase price within the stipulated time. It needs to be emphasised that settlement of the redemption sum of RM200,000 by Minply was not a term of the 2008 agreements. In *Lee Yew Hin v Kow Lup Piow* [1974] 1 MLJ 114 the Federal Court made the following observations, on the facts:

> In my judgment, the true construction of the agreement here is that the plaintiff was required to make his final payment on 20 November 1967, irrespective of whether or not the defendant had made his final payment to Loy by that date. Contract differs from most other branches of the law of obligations in one important respect, namely, that generally speaking the parties themselves are free to make their own rules as to what shall and shall not bind them. (See *Chitty on Contracts* (23th Ed), p1). The plaintiff had clearly bound himself under the Agreement to make his final payment on 20 November 1967. Once he had committed a breach of that agreement, the defendant was entitled to repudiate the contract and forfeit the deposit under cl 14 of the agreement.

(c) By and large PWl's evidence on crucial issues of fact is hearsay as they are based on what the deceased told him. Further I do not find it safe to rely on his evidence as he had lied on two material points. He said the deceased had paid Minply RM90,000 in the form of UOB cheque to Hafez & Partners. In actual fact the cheque was drawn by one 'Hope Link Sdn Bhd' and not Minply. In his witness statement PW1 said he had spoken or had given instructions to PW3 but this was flatly denied by PW3 who testified that she never took instruction from PW1 on the 2008 agreements.

(d) The allegation that the deposit sums were to be released as part of the redemption sums is also a material and crucial fact but again was not pleaded. It must therefore be excluded from consideration.

[7] On the evidence therefore, the administrators' claim against Minply cannot be sustained. On the other hand I am satisfied that Minply's counterclaim against the administrators had been proved on the balance of probabilities.

[8] As for Eurigine's and Legenia's suits against Minply, I do not find, having regard to the evidence and all the circumstances of the case that Minply is liable to Eurigine and Legenia in any way. In the first place when the 2012 agreements were entered into the evidence clearly shows that the lands were free from encumbrances. Besides, it is undisputed that Minply is still keen to sell the lands to Eurigine and Legenia. More importantly Minply's failure to complete the agreements was not due to any breach on its part but due to the existence of the private caveats lodged by the administrators.

[9] In Suits 492 and 496 Eurigine and Legenia are seeking, inter alia, for removal of the private caveats by the administrators. Eurigine and Legenia say they entitled to the reliefs sought as they were bona fide purchasers for value without notice for the lands and that they entered the caveats earlier in time than the caveats entered by the administrators. It is relevant to note that Minply's witness DW1 candidly admitted in cross examination that Eurigine and Legenia are entitled to specific performance of the 2012 agreements. This of course is a matter for the court to decide but it reflects Minply's position in relation to the 2012 agreements with Eurigine and Legenia. It is the private caveats lodged by the administrators that was holding up execution of the agreements. Under the circumstances it is understandable that Eurigine's and Legenia's claims are really directed at the administrators rather than Minply. Their grievances against the administrators, among others are as follows:

(a) due to the private caveats lodged by the administrators, they could not complete the agreement within the stipulated time and to take vacant possession of the lands;

(b) the loans taken by them from Bank of China Bhd had been affected and they had incurred additional costs and expenses; and

(c) they had lost business opportunities with regard to the lands.

[10] On the evidence it is my finding that Eurigine and Leginia were bona fide purchasers for value without notice of the lands. In this regard and in the light of my finding that the 2008 agreements between the deceased and Minply

had been lawfully terminated by Minply, it follows that Eurigine's and Legenia's claims against the administrators must be allowed in terms.

Order accordingly.

Reported by Kohila Nesan